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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ADELAIDE KIRCHER et al.,

Petitioner,

v.

THE SUPERIOR COURT OF MARIN
COUNTY,

Respondent;

BONNIE KIRCHER,

Real Party in Interest.

A125577

(Marin County
Super. Ct. No. CV 082412)

Petitioner Adelaide Kircher, also known as Adelaide Frances Batanides, petitions this court for a writ of mandate and/or prohibition challenging the trial court's July 21, 2009 Order on Submitted Matters.¹ Petitioner is decedent's widow and real party Bonnie Kircher is one of decedent's former spouses. Real party sued petitioner² for the breach of a spousal support agreement in which decedent allegedly agreed to support real party until her death. The court entered judgment in real party's favor, finding that decedent

¹ The superior court filed two orders in this case on July 21, 2009: "Order on Submitted Matters," and "Order on Submitted Matter." Although the petition's caption indicates that it is seeking relief from the "Order on Submitted Matter," the substance of the petition concerns issues addressed in the first order, dealing with multiple matters, and not the second order, denying a motion for a new trial.

² The suit against petitioner is both against her individually and in her capacity as executrix of decedent's estate.

had made a binding agreement to support real party during her lifetime. Pursuant to the court's judgment, the San Francisco Sheriff levied funds. After judgment various motions were filed concerning a stay of execution of the judgment, a proffered cash deposit in lieu of an undertaking, and the sufficiency of the undertaking. Ultimately, the trial court entered an order directing the sheriff to release the seized funds to real party, determining the proper amount of the undertaking, and ordering petitioner to pay real party monthly support during the pendency of the appeal.

The instant petition raises the following issues: (1) whether money held by the sheriff when an appeal is perfected should be returned to the judgment debtor or released to the judgment creditor; (2) whether appellant should be afforded time to cure a deficiency, pursuant to Code of Civil Procedure section 996.010, when a judicial determination is made that an appeal bond is deficient; (3) whether a judgment debtor may bond support payments as they come due during the pendency of the appeal; (4) assuming that a judgment debtor may bond those payments, may the trial court order future payments to be included in the bond,³ and (5) may the trial court compel petitioner to make direct payments to the real party when such payments are included in the bond?

The petition alleges that real party sued her former husband's estate and his widow, the petitioner, 33 years after decedent and real party were divorced, claiming that money is due her as a result of a breach of decedent's support agreement with her. In support of her claim, real party contends that her former husband intended to waive the provisions of Family Code section 4337 and continue to support real party during her lifetime. Petitioner, in her capacity as executrix of her husband's estate, rejected real party's claim to continuing support payments. On May 27, 2009 the superior court entered an "Amended Judgment After Trial by Court" in favor of real party and ordered the payment of specified amounts to her.

On June 9, 2009 petitioner moved ex parte for a stay of execution of the judgment; alternatively, petitioner requested an order directing the clerk of the court to accept a cash

³ The third and forth issues enumerated here are both discussed in Section III, *infra*.

deposit in lieu of a secured undertaking and tendered a cashier's check for \$53,838.75. After the superior court denied petitioner's application, petitioner filed a petition in this court, seeking to stay the enforcement of the judgment. On June 18, 2009, we denied that petition as "premature."⁴

On June 11, 2009 real party filed a writ of execution with the San Francisco Sheriff and a Notice of Levy against petitioner's deposit accounts at the First Republic Bank. On June 22 the bank issued a check to the sheriff for the levied amount, \$36,094.95. Petitioner states that on June 29, 2009 she filed a bond for \$92,147.00 which she determined to be 150 percent of the judgment plus 150 percent of nine months of the on-going support obligation. On July 17, 2009 she filed her appeal.

Real party then moved the superior court to declare that the bond was insufficient and to command the sheriff to release the levied funds in his possession. On July 21, 2009 the court granted real party's motion and also ordered petitioner to pay real party \$2,837.50 monthly support during the pendency of the appeal.

On July 27, 2009 petitioner filed the instant writ petition. That same day, we stayed that portion of the superior court's order directing the sheriff to release to the real party the funds he was holding. We also set a schedule for informal briefing, and issued *Palma* notice. In conjunction with filing her opposition, real party also filed a motion for the dismissal of a frivolous appeal and for sanctions.

I. The Money Levied By The Sheriff Should Be Returned To Petitioner If The Court Determines That The Bond Was Sufficient Or If Petitioner Timely Cures Any Deficiency.

Code of Civil Procedure section 916 provides generally that upon "the perfecting of an appeal" "proceedings in the trial court upon the judgment or order appealed from

⁴ At that time no notice of appeal had yet been filed; it was subsequently filed July 17, 2009. We note that had petitioner filed her notice of appeal, it would not have deprived the trial court of jurisdiction to hear her pending motion for a new trial, which is a collateral matter. (*Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 807.) The issues concerning the proffered deposit are now moot, given subsequent events.

. . . including enforcement of the judgment or order” are stayed. (Code Civ. Proc., § 916, subd. (a).)⁵ However, if the judgment is for “money or the payment of money” the perfecting of an appeal does not stay the judgment “[u]nless an undertaking is given.” (§ 917.1, subd. (a).) Thus, pursuant to sections 916 and 917.1 the enforcement of a superior court’s order for the payment of money is stayed upon (1) the filing of a notice of appeal and (2) the posting of an undertaking (or bond).⁶

Here petitioner (1) states she filed a \$92,147.00 bond on June 29, 2009 and (2) filed a notice of appeal on July 17, 2009, appealing both the May 13, 2009 Judgment and the May 27, 2009 Amended Judgment. Thus, she satisfied both statutory requirements for an automatic stay to go into effect.

Real party, relying on *Del Riccio v. Superior Court* (1952) 115 Cal.App.2d 29, maintains that because the sheriff had already collected money from petitioner *before* the stay went into effect, the court was required to release those funds to her. The *Del Riccio* court determined that when, pursuant to a writ of execution, money is already in the hands of the levying officer, it is the judgment creditor’s property and, thus, the court lacked the authority to order the officer not to pay the seized money to the judgment creditor. (*Id.* at p. 31.)

Del Riccio is not controlling authority here. There the superior court ordered the sheriff not to pay plaintiffs money that he had levied on their behalf. However, as the appellate court explains, the applicable statute, which authorized the court to issue a discretionary stay, did not authorize the court to order the sheriff to refrain from paying the judgment creditor money he had levied on the judgment. Neither do the court’s inherent powers empower it to order the sheriff to return the money to the judgment

⁵ All further statutory code references are the to Code of Civil Procedure, unless otherwise indicated.

⁶ An undertaking is executed by a surety, but not by the appellant. (§ 995.190.) A bond, however, is executed by both. (§ 995.140, subd. (a).) For present purposes, however, there is no practical distinction in the result: either may be posted in order to obtain a stay. (§ 995.210.)

debtor. Because the trial court improperly arrogated to itself a power not bestowed on it by statute and not within its inherent powers, the Court of Appeal reversed the lower court and allowed the money to be paid to the judgment creditor. (*Del Riccio v. Superior Court, supra*, 115 Cal.App.2d at p. 31.) We agree with the principle, announced in *Del Riccio*, that the court's power "to stay execution is limited by statute." (*Ibid.*) Here, however, the stay arose pursuant to statutes that were passed after *Del Riccio* was decided.⁷ As explained in *California Commerce Bank v. Superior Court* (1992) 8 Cal.App.4th 582, 586, currently, section 697.040, subdivision (a)(1) provides that "if enforcement of a judgment is stayed on appeal by the giving of a sufficient undertaking, existing liens created . . . are extinguished." (*Id.* at p. 586.) Under section 697.050 if a lien is extinguished, the property held subject to that lien is to be released to the judgment debtor. (*Ibid.*) In other words, the applicable statutory regime requires the levying officer to return money in his possession if a stay arises before those funds are released to the judgment creditor. Thus, in *California Commerce Bank*, the appellate court issued a peremptory writ directing the lower court to vacate its order denying petitioner's motion for the return of funds and, absent a finding that the bond was insufficient, to enter a new order granting the motion. (*Id.* at p. 588.) (See also *Estate of Neilson* (1960) 181 Cal.App.2d 769, 773 [distinguishing *Del Riccio* from situation where there is a statutory stay].)

Real party argues that *California Commerce Bank* is distinguishable from the instant situation because there the notice of appeal was filed before the bond was filed, while here the order in which those two events occurred was reversed. Although we agree with real party that there was no stay in effect before both these acts were accomplished, we see nothing in either the technical application of the statutory stay or any relevant legal principle which makes the order in which the notice of appeal and the bond are filed significant for present purposes. As long as they are both accomplished

⁷ The operative statute in *Del Riccio v. Superior Court, supra*, 115 Cal.App.2d 29, section 681a, has been superseded.

before the levying officer releases the funds to the judgment creditor, the automatic statutory stay goes into effect and the money is to be returned to the judgment debtor.

(See *California Commerce Bank v. Superior Court*, *supra*, 8 Cal.App.4th at p. 587.)

Thus, here the money seized by the sheriff should be returned to petitioner if, on remand, the trial court determines that the posted bond is sufficient or if petitioner timely cures any deficiency.

II. When A Judicial Determination Is Made That A Bond Is Deficient, Pursuant To Section 996.010, The Trial Court Must Give The Judgment Debtor At Least Five Days To Cure The Deficiency.

Both parties agree that when the trial court determines that an appeal bond is deficient, the party posting the bond must be given at least five days to cure the deficiency. (See § 996.010, subd. (c).) Real party, however, maintains that the requirement that petitioner be afforded at least a five-day grace period is irrelevant because the challenged order “merely sets forth the amount of the insufficiency,” but does not deny petitioner the “right to increase the undertaking.” We disagree. The superior court’s failure to allow for a grace period for petitioner to augment her initial bond is not irrelevant because when a trial court determines that a bond is insufficient, the statute implies a grace period of at least five days, during which time the judgment debtor’s rights flowing from having posted the original bond remain in effect. (See § 996.010, subd. (d).) Those rights are not extinguished until the judgment debtor fails to post the increased bond within the permitted grace period. Thus, by not allowing petitioner time to cure the allegedly deficient bond, petitioner was improperly deprived of the opportunity to maintain the rights she had secured by posting of the original bond.

Real party also maintains that in response to the trial court’s determination that the posted bond was insufficient, rather than curing the deficit, petitioner opted to reduce the posted bond. Petitioner dismisses this assertion as inaccurate.

Petitioner asserts that she posted a bond for \$92,147.00. In support of this assertion, she submits an exhibit, entitled “Undertaking under Section 917.1 C.C.P.,” in Case CV 082412, showing a bond for the stated amount. The submitted exhibit,

however, unlike the documentation submitted to prove subsequent undertakings, does not show a superior court file stamp. At the hearing on real party's motion for attorney's fees, the superior court indicated that the appropriate additional bond was \$88,132.50. The court stayed the execution of its order until July 30, 2009. Petitioner timely posted a second bond for \$88,132.50.

In its July 21, 2009 order the court determined that the proper amount of the undertaking was \$144,328.95.⁸ Assuming the accuracy of petitioner's claim that she posted both the \$92,147.00 bond and the subsequent \$88,132.50, she has posted total bonds of \$180,279.50—exceeding the trial court's requirement;⁹ however, because of the lack of a file-endorsed copy of the original bond, the record does not allow for an independent determination of exactly what bonds petitioner posted. Accordingly, we remand this matter to the superior court for its determination of this factual issue.¹⁰ Assuming the bonds were filed as petitioner alleges, they must be considered timely because petitioner was not afforded at least five days to supplement the original posting. Should the court, on remand, determine that the bond(s) already posted are insufficient, petitioner must be given at least five days to cure the deficiency.

⁸ The court also computed the adjusted undertaking, pursuant to its order that the money held by the sheriff was to be released to real party. Given our determination that that money should be returned to petitioner, we need not concern ourselves with that determination.

⁹ The trial court's July 21, 2009 order adverts to the possibility of supplementing the undertaking, based on a future ruling regarding attorney's fees. Petitioner asserts that the superior court awarded real party her costs and that she posted an additional bond of \$8,751.50. The parties, however, do not dispute that subsequent bond was filed; because it was a bond posted in conjunction with an appeal of a subsequent order, it is not germane to the present discussion.

¹⁰ Real party brings a motion to dismiss a frivolous petition and for sanctions based on petitioner's "attitude of contempt, having reduced the undertaking in the face of an order for an increase." There being no evidence at present that petitioner reduced the undertaking, the motion is denied without prejudice to real party raising the issue in conjunction with the pending appeal should the superior court determine that the initial bond was not posted as petitioner alleges.

III. Although Spousal Support Payments May Be Bonded, The Trial Court Erred In Ordering Petitioner To Bond Future Support Payments Prior To Their Becoming Due.

The superior court based its calculation of the bond, in part, on 18 months of future monthly support. Petitioner asserts that a court may not determine that a bond is insufficient based on amounts which are not yet due. The superior court relied, in part, on Family Code section 3600, which allows a court to order on-going support payments during the pendency of the proceedings. But the sweep of that provision is limited to proceedings involving marital dissolution, legal separation, or the support of minor dependents. (Family Code § 3600.) In the present case, the divorce was decreed long ago; this is simply a breach of contract case, arising in the context of settling decedent's estate. The support payments that are allegedly due are derived from an agreement for spousal support — not the support of a minor. Thus, this matter is not governed by Family Code section 3600. (See also *Sharon v. Sharon* (1885) 67 Cal. 185, 220 [approving the calculation of the undertaking based, in part, on future alimony payments]; *Hogan v. Locke Paddon* (1928) 91 Cal.App. 606, 612 [approving procedure in divorce cases which takes into consideration the monthly allowance awarded and the probable duration of the appeal in fixing bond].)

Case law supports our conclusion that in cases of this type a bond may not be based on amounts not yet due. In *Schallman v. Haas* (1917) 33 Cal.App. 28, the appellate court determined that, in an action brought by a mother for support of an illegitimate child, the superior court had no authority to compel the alleged father to pay support pending appeal. The *Schallman* court distinguished that situation from divorce actions, where the marriage is admitted and such orders are permissible. (*Id.* at pp. 33-34.) Here, the basis for the continuing payments to real party is not admitted; instead, this case is governed by the general rule that a “court, after judgment has no right to require the defendant to provide the plaintiff with the financial means with which to

defend the judgment on appeal and to pay a monthly sum for . . . support”¹¹ (*Id.* at p. 34.) Thus, because this is not a divorce case, but simply a case alleging contractual money damages, the trial court exceeded its authority in basing the bond amount, in part, on future support payments. (See also *Kilroy v. Kilroy* (1995) 35 Cal.App.4th 1141, 1147-1148 [affirming trial court’s power to order pendent lite support when enforcing statutory support rights as distinguished from situations where parties are seeking to enforce contractual rights].)

Parenthetically, we note that the law does not allow for a general exception to the bonding procedures to ensure that all support payment recipients continue to receive support pending an appeal. Thus, for example, under the Probate Code, an order granting a family allowance pending appeal is routinely stayed unless the person who benefits from that order posts a bond of twice the payments to be made. (Prob. Code § 6545.) We can think of no reason why a former spouse, such as petitioner, should be treated preferentially as compared to individuals who would either be entitled to or eligible for a family allowance pending the administration of an estate.¹²

¹¹ *Schallman* actually concerned an order for the support of a minor. After *Schallman* was decided the underlying statute it was interpreting, Civil Code section 196a, was first amended (see *Krog v. Krog* (1948) 32 Cal.2d 812, 817), and then repealed. The distinction *Schallman* draws between suits where a litigant is attempting to enforce statutory support rights versus contractual rights remains valid in the context of spousal support.

¹² Petitioner does not challenge the court's authority to require a bond for monthly support payments as they become due. For that reason she filed a bond based, in part, on nine months of future support payments. She also states that she will continue to bond future payments, as necessary, “in amounts much larger than a single month.” Although her decision to bond future payments is voluntary, there is an important practical reason that motivates her doing so: it relieves her of an on-going monthly obligation to supplement the bond, and of the resulting liability should she fail to do so.

IV. If A Judgment Debtor Bonds On-Going Support Payments Ordered By The Court, The Court May Not Order The Debtor To Pay Additional Support Payments Pending An Appeal.

The reason an undertaking is required to stay a money judgment is to ensure the appellee that there will be sufficient funds “to meet the amount of the money judgment, costs and postjudgment interest after postponing enjoyment of a trial court victory.” (*Grant v. Superior Court* (1990) 225 Cal.App.3d 929, 934.) To the extent that real party receives support payments pending the appeal, she is not “postponing enjoyment” of her victory. Imposing an obligation that petitioner make direct payments to real party when she is posting appropriate bonds would subject her to an unfair double burden. Those payments would be redundant as the on-going support payments are already accounted for in the continuing bond payments petitioner is making. Consequently, so long as petitioner bonds on-going support payments, the court may not also require her to make duplicative support payments directly to real party.

CONCLUSION AND DISPOSITION

Generally, this court will employ “the accelerated *Palma* procedure . . . only when petitioner’s entitlement to relief is so obvious that no useful purpose could reasonably be served by plenary consideration of the issue . . . or when there is an unusual urgency requiring acceleration of the normal process.” (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1236-1237, 1240-1241.) Here no purpose would be served by further argument or briefing.

Let a peremptory writ of mandate issue commanding respondent superior court (1) to vacate that portion of its July 21, 2009 Order on Submitted Matters directing the San Francisco Sheriff to release funds in his possession to real party; and (2) to vacate that portion of its July 21, 2009 Order directing petitioner to pay real party temporary support payments and to refrain from entering any further support orders for amounts due pending the appeal for which petitioner posts a timely bond. The matter is further remanded to the superior court to determine the total amount of bonds petitioner has filed, to calculate the required bond, in accordance with this decision, and to determine

whether the posted bond is sufficient. Should the court determine that the posted bond is insufficient, it must allow petitioner at least five days to cure the deficiency. If the court determines that the posted bond is sufficient or, if petitioner timely cures any deficiency, the court shall issue a new order directing the San Francisco Sheriff to return the funds in his possession to petitioner. Should the court determine that the posted bond is insufficient and petitioner fails to cure the deficiency in a timely manner, the court shall reinstate its order directing the Sheriff to release the funds to the real party. The stay previously issued shall be lifted automatically upon entry of the trial court's new order, in accordance with this decision.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.